No. 15835

United States
Court of Appeals
for the Ninth Circuit

RICHARD DOUGLAS FURNISH,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—1-17-58

No. 15835

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MURRAY M. CHOTINER,
RUSSELL E. PARSONS,

202 South Hamilton Drive,
Beverly Hills, California.

For Appellee:

EDMUND G. BROWN,

Attorney General,

JAMES L. MAMAKOS,

Deputy Attorney General,

600 State Building,
Los Angeles 12, California. [1*]

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* Page numbers appearing at bottom of page of Original Transcript of Record.

In The United States District Court, Southern District of California, Central Division

No. 1305-57T

RICHARD DOUGLAS FURNISH, M.D.,
Plaintiff,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA, JOHN DOE I to V, inclusive, Defendants.

COMPLAINT

(Declaratory Relief—Injunction)

Comes now the plaintiff, Richard Douglas Furnish, M.D., and for cause of action against the defendants above named complains and alleges as follows:

I.

That the plaintiff is a resident and citizen of the State of California, County of Los Angeles, and the above District, and has been such for the last twenty years. That your petitioner has continuously for the past twenty years been a practicing physician and surgeon, duly licensed to practice in the State of California, and so licensed by the Board of Medical Examiners of the State of California, and that for the last twenty years he has maintained an office in Los Angeles County, California, and has built and established a substantial business as a physician and surgeon. That on or about the 10th day of November, 1955, the said

Board of Medical Examiners made an order directing that the [2] plaintiff be suspended for a period of one year from the practice of medicine and surgery in the State of California, which order is effective, unless stayed by an order of this Court.

That said order of suspension for one year made by said Board of Medical Examiners was made after a hearing before the Board's Hearing Officer, Philip C. Farman, in which the said Hearing Officer proposed that your complainant be suspended from the practice of medicine and surgery for one year, and that the execution of this order of suspension be stayed and that your petitioner be placed upon probation for a period of three years, upon terms and conditions substantially requiring that he obey all laws of the United States and of the State of California, its political subdivisions, and all rules and regulations governing the practice of medicine and surgery in the State of California.

Notwithstanding such recommendation by said Hearing Officer, the said Board of Medical Examiners made the order of suspension for a period of one year hereinabove described.

II.

That the order heretofore referred to, made by the said Board of Medical Examiners suspending the plaintiff from the practice of medicine and surgery in California for a period of one year, was made after a proceeding in the United States District Court for the Southern District of California,

Central Division, entitled "United States of America vs. Richard Douglas Furnish" (charged as Richard D. Furnish), bearing that Court's No. 22,754 Criminal. That the plaintiff entered pleas of nolo contendere to two counts of felonies, being violations of Title 26 U. S. Section 145(b), charging that he did wilfully and knowingly attempt to defeat and evade a large part of the income tax owing by him to the United States of America for the calendar years 1947 and 1948, and each of said years. Plaintiff alleges that under the federal rules the stigma which follows and attaches to conviction of a felony is not considered to attach and follow a plea under a nolo contendere plea. That the Honorable Leon R. Yankwich, United States District Judge Presiding in the [3] matter pronounced the judgments upon which this disciplinary action is based. At the time of pronouncement of judgment, the Court had this to say:

"The Court: This case is different from the usual one involving a physician. Many a time a physician involved in income tax difficulties is one who resorts to unethical practices, and who then tries to cover them up by covering up his income tax. In this particular case there is no such thing. There is no income indicated from any improper sources. This is really the case of a person who has become involved because of his lack of experience in financial matters and his failure to surround himself with persons who, while he is carrying on his work, would watch his finances and see that proper report is made. This is a very volumi-

nous file here which has been built up by the many letters sent in, which I have in front of me. Some are of a confidential nature and I will not have them filed, but will return them to the probation officer.

"I think the man's past life is not such that probation would be necessary. I think a substantial fine will serve the ends of justice in this particular case, and allow this man to go on. I think, on a plea of nolo contendere they do not consider—at least, the Medical Board does not consider that as a ground for revoking his license, and unless they have professional grounds, certainly his license should not be revoked for this particular offense. I am sure it would be revoked if I imposed any sentence other than a fine, although, technically speaking, a plea of nolo contendere does not carry with it any of the civil penalties.

"Is there any legal cause why judgment should not [4] now be pronounced?

"Mr. Carr: None, your Honor.

"The Court: It is the judgment of the court for the offense for which you stand convicted—is it count 1?

"The Clerk: Count 2, your Honor.

"Mr. Kennison: To counts 2 and 3 he entered the plea.

"The Court: To counts 2 and 3, and not guilty to count 1.

"It is the judgment of the court that on count 2 you be fined the sum of $5,000, and on count 3 the sum of $5,000.

"Mr. Kennison: I move to dismiss count 1, your Honor.

"The Court: Count 1 will be dismissed, and time will be allowed, if time is desired."

That there was a finding by the trial court that "technically speaking, a plea of nolo contendere does not carrying with it any of the civil penalties." That the trial court, after a full consideration of all of the matters and with full knowledge of the law insofar as the effect of a nolo contendere plea was concerned, was attempting to pronounce such a judgment as would preclude the penalty which has been assessed by the Board of Medical Examiners against the plaintiff.

III.

That the plaintiff contends that mere proof of a nolo contendere plea to a charge of tax evasion is insufficient to warrant the action of the Board in suspending the plaintiff from the practice of medicine, where there is no affirmative proof of moral turpitude, and in this case Judge Yankwich, the trial Judge in the Federal Court, in effect held that there was no moral turpitude; and, in effect, this matter became Res Adjudicata.

IV.

That Section 2383 of the Business and Professions Code, as [5] amended by the Statutes of 1951, Chapter 792, paragraph 1, provides as follows:

"Sec. 2383. Conviction of felony or offense involving moral turpitude; record as evidence: What deemed conviction: Authority of Board after order under Pen. C. Sec. 1203.4. The conviction of a felony, or of an offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The Board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code, allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty or dismissing the accusation, information or indictment."

That said Section 2383 of the Business and Professions Code, as hereinbefore alleged, was enacted in 1951; that the offenses to which your complainant entered a nolo contendere plea occurred in the years 1947 and 1948.

That at the time these offenses were alleged to have been committed, namely, income tax evasion for the years 1947 and 1948, Section 2383 of the

Business and Professions Code provided as follows:

"Sec. 2383. Conviction of felony or offense involving moral turpitude: Evidence. The conviction of a felony [6] or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct."

That the substantial changes in Section 2383, as enacted in 1951, insofar as they relate to your petitioner, are: That after the words, "the conviction of a felony" a comma was inserted, so that the statute, as amended in 1951, read:

> "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter * * *"

And there was added:

> "A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section * * *"

There are therefore two changes in the Section as enacted in 1951: First: That a comma was inserted after the word "felony"; second, an addition was made to the Section to the effect that a plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this Sec-

tion. That no comma was inserted after "felony" in the second portion.

That plaintiff alleges that the Board of Medical Examiners has applied to the plaintiff the law as enacted in 1951, rather than the law as it was in 1947 and 1948. The law itself, as enacted in 1951 and its application in this case to events occurring in 1947 and 1948, amounts to the passage of and application of an "ex post facto law," and thus the law itself and its application is unconstitutional and in violation of Article I, Section 10 of the Constitution of the [7] United States which provides, among other things, that no State shall "pass any bill of attainder or ex post facto law." The application of such an ex post facto law amounts to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Section 2383 of the Business and Professions Code, as enacted in 1951 and as described hereinbefore, sets up a ground for disciplinary action which was not a ground for disciplinary action in 1947 and 1948, which is the time the occurrences took place upon which this order of suspension is based.

The action of the Board in thus applying to plaintiff the statute as enacted in 1951 for acts committed in 1947 and 1948 is unconstitutional, as just hereinbefore set forth.

That at the time of the occurrences of the offenses to which your complainant entered the plea of nolo contendere, Section 2383 provided as hereinabove set forth,

"the conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct * * *"

This meant that the felony must have been of such a nature as to involve moral turpitude. As the law now reads, as amended in 1951, it appears to mean any felony, whether it involves moral turpitude or not; although no comma exists after the word "felony" in the portion dealing with a nolo contendere plea.

V.

That plaintiff, as such physician and surgeon, has built up a substantial business within the County of Los Angeles, and his right to practice as a physician and surgeon is a vested property right of substantial value, and great and irreparable injury will result to plaintiff if the order of the Board of Medical Examiners of the State of California, directing that the plaintiff be suspended from practice for one year, be enforced and allowed to stand. [8]

VI.

That plaintiff alleges that the action of the Board of Medical Examiners of the State of California, as hereinabove set forth, amounts to a denial of the plaintiff's civil rights, in that a plea of "nolo contendere" in the federal court does not carry with it the suspension of such person's civil rights and, in this case, the proceeding by the defendant Medical Board to suspend the plaintiff from practice of medicine within the State of California for a period of a year amounts to a violation of his civil rights

and is in violation of the Fourteenth Amendment to the Constitution of the United States and a violation of "due process" of law.

That the act of the defendant Medical Board in suspending the plaintiff from the practice of medicine for a period of a year is an intrusion by said Medical Board into the processes of the federal court in this particular instance, and is an effort by the same defendant Medical Board to attach a penalty which is not prescribed by law.

That the plaintiff, as hereinbefore set forth, has practiced medicine within the City and County of Los Angeles, California, for more than twenty years last past, and at the present time has approximately 400 patients dependent upon the plaintiff for care and treatment, many of whom are seriously ill, and many of whom are without funds, being treated by this plaintiff without charge; that plaintiff's practice is a substantial one and, if he is required to cease the practice of medicine at this time, he will suffer great damage; that he has no speedy or adequate remedy except by recourse to this Court for an injunction to restrain the defendant Board of Medical Examiners of the State of California from suspending this plaintiff from the practice of medicine within the State of California.

VII.

That the District Court of Appeal of the State of California [9] in and for the Second Appellate District affirmed the judgment of the Superior

Court of the State of California in and for the County of Los Angeles, dismissing petitioner's petition for writ of mandate to set aside the decision of the Board of Medical Examiners.

A petition for rehearing in the District Court of Appeal was denied on April 9, 1957.

An application to the District Court of Appeal to grant a rehearing on its own motion was denied April 19, 1957.

The petition for hearing in the California Supreme Court was denied on May 15, 1957.

The petition for Writ of Certiorari was duly filed in the Supreme Court of the United States and was denied on October 14, 1957.

The Petition for Rehearing of the petition for Writ of Certiorari was denied by the Supreme Court on November 18, 1957, notice of said ruling being received by plaintiff on November 21, 1957; that the stay granted by the Supreme Court expired at that time.

VIII.

That an actual bona fide dispute exists between the plaintiff and the defendants herein; that the defendants contend that they have a right under the law to suspend the plaintiff from the practice of medicine; they contend that civil penalties do attach to a nolo contendere plea in the United States Court; they contend that the act under which they seek to suspend the plaintiff doctor is no ex post facto law; they contend that their acts and conduct in suspending the plaintiff doctor are con-

stitutional and in all respects regular and in accordance with the law.

The plaintiff contends that the defendants seek to take from him his civil rights to practice medicine by reason of his nolo contendere plea; that the defendants seek to hold that a nolo contendere plea carries with it the loss of civil rights, and, particularly, the right to practice medicine—the plaintiff contends that the defendants seem to apply to him an ex post facto law in [10] violation of Article I, Section 10 of the United States Constitution which provides, in substance, "that no state shall pass any bill of attainder or ex post facto law". The application of such an ex post facto law amounts to denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The defendants seek to apply against the plaintiff a law which was not in effect at the time the alleged acts were committed from which arose the plea of nolo contendere.

The plaintiff contends that the defendants have invaded the processes of the federal court in that they have sought to intrude a judgment passed on the nolo contendere plea to include civil sanction which cannot be attributed to such a plea in the federal court.

The plaintiff contends that the entire proceeding before the Board of Medical Examiners of the State of California was arbitrary, capricious, unreasonable and in violation of the law.

IX.

That this is a bona fide dispute and will require a decree and judgment of the court to declare and determine the rights of the parties—to determine whether the laws, the regulations and their enforcement are unconstitutional, and to declare and determine the rights of the respective parties, namely, the defendants, the Board of Medical Examiners of the State of California, and plaintiff doctor.

X.

That there is no plain, speedy and adequate remedy in the ordinary course of law by which the plaintiff might obtain justice, and therefore he seeks this declaration of rights and injunction.

XI.

That the defendants, John Doe I to V inclusive, are named herein under their fictitious names for the reason that plaintiff does not know the true names of such defendants, but plaintiff is [11] informed and believes, and upon such information and belief alleges that such defendants were at all times herein mentioned and are the agents of defendant, Board of Medical Examiners of the State of California, and when plaintiff has ascertained the true names of such defendants, he will ask leave of this Court to amend this complaint to include their true and correct names.

Wherefore, plaintiff respectfully prays as follows, to-wit:

1. That his rights in the premises be declared, and that the order of the Board of Medical Examiners of the State of California, suspending the plaintiff from the practice of medicine in the State of California for one year, be declared null and void;

2. That an order to show cause be issued out of this Court directed to the defendants, requiring them to appear and show cause before this Court why they should not be restrained from enforcing their order of suspension of plaintiff from the practice of medicine in the State of California; that a time be fixed by this Court for the hearing of said order to show cause, and that upon such a hearing, said order be made permanent pending a trial of this matter upon the merits; that a permanent injunction be issued against the defendants, restraining them from carrying into effect the order of suspension of said plaintiff from the practice of medicine in the State of California, and that upon the hearing of this order upon the merits that the same be made permanent.

3. That in the alternative a writ of mandate be issued out of this Court, commanding the said Board of Medical Examiners of the State of California to cease and desist from enforcing the order of suspension hereinabove described, and from interfering with the said plaintiff in the practice of his profession as a physician and surgeon in the State of California.

4. For such other and further relief as to the

Court may seem meet, just and equitable in the premises.

MURRAY M. CHOTINER and
RUSSELL E. PARSONS,
/s/ By MURRAY M. CHOTINER,
Attorneys for Plaintiff, Richard
Douglas Furnish, M.D. [12]

Duly Verified. [13]

[Endorsed]: Filed November 25, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon reading the verified complaint in this action and the affidavit of Richard Douglas Furnish, M.D., and it appearing to the satisfaction of the court therefrom that this is a proper case for granting a temporary restraining order, and that unless the temporary restraining order prayed for in said complaint be granted, great injury will result to the plaintiff before the matter can be heard on notice,

Now, Therefore, It Is Hereby Ordered that the defendant, the Board of Medical Examiners of the State of California, be and appear before this Court in the court room of Ernest A. Tolin, located on the second floor of the Los Angeles Post Office and Court House Building at Temple and Broadway Streets, Los Angeles, California, at the hour of 2:00 o'clock p.m. on the 6th day of December, 1957, then and [14] there to show cause, if any it has,

why it and its agents, servants, officers and employees should not be enjoined and restrained during the pendency of this action from enforcing the order made by the Board of Medical Examiners of the State of California on the 10th day of November, 1955, suspending the said Richard Douglas Furnish, M.D., the plaintiff herein, from practicing medicine and surgery within the State of California.

It Is Further Ordered that pending the hearing of this Order to Show Cause that the defendants and its servants, agents, officers and employees be and they are hereby enjoined and restrained from enforcing that order made by the Board of Medical Examiners of the State of California on the 10th day of November, 1955, suspending the said Richard Douglas Furnish, M.D., from practicing medicine and surgery within the State of California.

It Is Further Ordered that a copy of the original petition herein and affidavit of Richard Douglas Furnish, M.D., and Points and Authorities be served on the defendant not later than the 26th day of November, 1957.

Dated: This 25th day of November, 1957, at 12:15 p.m.

/s/ ERNEST A. TOLIN,
United States District Judge. [15]

[Endorsed]: Filed November 25, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS FOR FAILURE OF PETITIONER TO STATE A CAUSE ENTITLING HIM TO RELIEF AND FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER

Comes Now the defendant, the Board of Medical Examiners of the State of California, and makes this motion to dismiss the complaint (Declaratory Relief—Injunction) upon the following grounds, to-wit:

I.

That the complaint in declaratory relief—injunction does not, nor does any part thereof, state a claim on which relief can be granted, nor does the same nor any portion thereof state facts sufficient to entitle the petitioner to the relief sought or to any relief.

II.

That the court lacks jurisdiction over the subject matter of the complaint in declaratory relief—injunction. [16]

Wherefore, defendant, the Board of Medical Examiners of the State of California, prays that plaintiff and petitioner take nothing by this proceeding; that the said proceeding be dismissed and that the temporary restraining order be dissolved and the injunction sought be denied; that the defendant have judgment against said petitioner en-

tered for costs incurred herein; and for such other and further relief as the court shall deem proper.

Dated: This 4th day of December, 1957.

EDMUND G. BROWN,
Attorney General,

/s/ JAMES L. MAMAKOS,
Deputy Attorney General,
Attorneys for Defendant, the Board of Medical Examiners of the State of California. [17]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 4, 1957.

[Title of District Court and Cause.]

ORDER RESTORING AND GRANTING INJUNCTION DURING PENDENCY OF APPEAL

On motion duly made by Richard Douglas Furnish, M.D., plaintiff and appellant, and it appearing to the satisfaction of the Court that this is a proper case for restoring and granting an injunction during the pendency of an appeal by plaintiff and appellant from the Order Dissolving Temporary Restraining Order and the Judgment of Dismissal for Lack of Jurisdiction Over the Subject Matter, and that, unless there is a restoration and granting of an injunction pending the appeal, great injury will result to the plaintiff before the matter can be determined on appeal,

Now, Therefore, It Is Hereby Ordered:

That pending the appeal taken by plaintiff and appellant, that the defendant and respondent the Board of Medical Examiners of the State of California, its agents, servants, officers and [54] employees be, and they are hereby enjoined and restrained from enforcing that Order made by the Board of Medical Examiners of the State of California on November 10, 1955, suspending the said Richard Douglas Furnish, M.D., from practicing medicine and surgery within the State of California.

Bond is hereby fixed in the sum of $250.00.

Dated: December 16, 1957.

/s/ ERNEST A. TOLIN,
United States District Judge. [55]

[Endorsed]: Filed December 16, 1957.

In the United States District Court for the Southern District of California, Central Division

No. 1305-57-T

RICHARD DOUGLAS FURNISH, M.D.,
Plaintiff,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA, JOHN DOE ONE TO FIVE, INCLUSIVE,
Defendants.

JUDGMENT OF DISMISSAL FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER

The above entitled matter having been set for hearing on an Order to Show Cause on December 6, 1957, Murray M. Chotiner and Russell E. Parsons appearing on behalf of plaintiff, Richard Douglas Furnish, M.D.; defendant, the Board of Medical Examiners of the State of California, appearing by Edmund G. Brown, Attorney General, by James L. Mamakos, Deputy Attorney General, and after hearing it is

Ordered that defendant's motion to dismiss for lack of jurisdiction be sustained; that the complaint be dismissed and that plaintiff take nothing by his suit.

Ordered, Adjudged and Decreed this 16th day of December, 1957.

/s/ ERNEST A. TOLIN,
United States District Judge. [56]

[Endorsed]: Lodged December 10, 1957. Filed and Entered December 16, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Richard Douglas Furnish, M.D., plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Dissolving Temporary Restraining Order and Judgment of Dismissal for Lack of Jurisdiction Over the Subject Matter, entered in this action on December 16, 1957.

MURRAY M. CHOTINER and
RUSSELL E. PARSONS,
/s/ By MURRAY M. CHOTINER,
Attorneys for Appellant, Richard Douglas Furnish, M.D. [57]

Affidavit of Service by Mail Attached. [58]

[Endorsed]: Filed December 16, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 61, inclusive, containing the original:

Complaint.

Order to show cause and Temporary Restraining Order.

Motion to Dismiss, etc.

(Certified Copy) Order restoring and granting Injunction during pendency of Appeal.

(Certified copy) Judgment of Dismissal for Lack of Jurisdiction over the subject matter.

Notice of Appeal.

Request for and Designation of Record and Proceedings to be contained in Record on Appeal.

B. One volume of Reporter's Transcript of Proceedings had on December 6, 1957.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated December 24, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk,
/s/ By WM. A. WHITE,
Deputy Clerk.

In the United States District Court, Southern District of California, Central Division

No. 1305-57-T

RICHARD DOUGLAS FURNISH, M.D.,
Plaintiff,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Defendant.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California
December 6, 1957

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For the Plaintiff: Murray M. Chotiner and Russell E. Parsons, 202 South Hamilton Drive, Beverly Hills, California. For the Defendant: Edmund G. Brown, Attorney General, by James L. Mamakos, Deputy Attorney General, 600 State Building, 217 West 1st Street, Los Angeles, California. [1]*

Friday, December 6, 1957, 2:03 P.M.

The Court: Call the case.

The Clerk: 1305-57-T, Richard Douglas Furnish, M.D., v. State Board of Medical Examiners, State of California.

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* Page numbers appearing at top of page of Reporter's Transcript of Record.

Hearing on plaintiff's order to show cause re temporary restraining order.

The Court: Are you ready?

Mr. Mamakos: Ready, your Honor.

Mr. Chotiner: Ready.

Mr. Parsons: Ready.

The Court: There is a motion to dismiss.

Mr. Mamakos: Yes, your Honor.

At this time I would like to make an oral motion that the motion to dismiss, which is on file, be heard at this time in connection with the order to show cause, if your Honor has had sufficient time to peruse the points and authorities in support of that written motion.

The Court: They were rather extensive, but I did get them read.

Mr. Mamakos: Your Honor, although they are extensive I also would like to indicate a correction in regard to those points and authorities. As your Honor knows, this matter was in this court once previously on another declaratory relief action, and inadvertently my secretary included in the [2] points and authorities authorities with regard to a cause of action stated in the First Complaint and Declaratory Relief, which was omitted by the petitioner in the second. And the authorities on line 24, page 31, to line 29, page 34, of the extensive points and authorities, in support of this present motion to dismiss, should be disregarded and stricken, and I so move your Honor.

The Court: Well, they are already here, so we will let them stay. There are some typographical

errors, too, but you need not correct those. For instance, you cited something, which I think is 59 Cal. (2d), which was a decision handed down within the last six months. I am sure they were way up beyond 59 then.

Mr. Mamakos: I am sorry. No doubt that is reported in the bound volumes.

The Court: Yes.

Mr. Mamakos: If your Honor is willing, I will just briefly mention the points in support of the motion to dismiss, which are elaborated upon quite extensively in the points and authorities.

First of all, your Honor is aware when this matter first came up in this court your Honor granted the motion to dismiss upon the ground that if the petitioner had a remedy, that his remedy was in the United States Supreme Court from the final disposition of the matter by the California State Court. [3]

The petitioner thereupon did petition for a writ of certiorari in the United States Supreme Court, which was duly acted upon by that court in denying that petition.

The petitioner herein also filed a petition for reconsideration of the petition for writ of certiorari, and that also was denied, and I think the entire judicial history with regard to this particular litigation is set forth on line 29, page 1, to line 19, page 5, of the points and authorities in support of the Board of Medical Examiners' motion to dismiss.

Your Honor, I must confess that in researching the problem here I was unable to find, outside of

the criminal habeas corpus field, a situation where a United States District Court, in view of the judicial proceedings already having transpired with regard to this case, has stated that an independent action could be filed in a federal District Court after the state proceedings had been consummated and an appeal taken to the United States Supreme Court, and the determination of that body having become final.

I think the cases cited in the points and authorities in support of the res adjudicata ground involve cases where the petitioner had not as yet petitioned the United States Supreme Court for petition of certiorari and there the cases have consistently held that an independent suit in a federal court is a misconceived remedy. [4]

Secondly, your Honor, I would just like to briefly comment on another ground why I believe the petitioner cannot claim the jurisdiction of this court for his alleged grievances, and, that is, that I do believe, with all due respect to the court, that this court is not empowered to concern itself with this type of proceeding.

I think that petitioner's cause of action cannot be heard in a court of this nature, because the federal District Court is not given the power to interfere with final state proceedings, unless some federal ground be stated. I think that the points and authorities in support of the motion are quite specific and elaborate in dealing with that point.

Your Honor, just one final word. This is a matter that has been in litigation for several years,

since the administrative determination in the fall of 1954. The petitioner certainly has had his day in court, he has had several years. I think the points raised in the petitioner's Complaint have been repeatedly asserted, not only in the state court, but in the United States Supreme Court, without success.

I think in the interest of justice and expediency that the matter should not be allowed to continue to be the concern of any further courts.

Thank you.

Mr. Chotiner: First of all, if the court please, I think we have this kind of a situation here: The state, in [5] acting in this matter, is relying on something that happened in the federal court under a federal statute.

In the case of In Re Hallinan, which we cited in our points and authorities at page 2, line 21, it specifically states:

> "Since Section 145, Subdivision (b),——"

the income tax law itself

> "——is a United States statute, we must accept the interpretation given it by the United States courts."

The case In Re Hallinan sought to disbar an attorney. The Supreme Court of the State of California held, and properly so, they must show moral turpitude, in order to take disciplinary action against an attorney, involved in a violation of the income tax law.

Now, the only difference between the section of the Business and Professions Code as it relates to

a lawyer and as it relates to a doctor is simply this: That when the 1951 amendment was passed, incorporating the provision that a plea of nolo contendere in the case of a doctor could be used as a conviction for the purpose of disciplinary action, they inserted a comma after the word "felony" in the first portion of the section. Before 1951 there was no comma there, so it read: "In the case of a conviction of a felony or any offense involving moral turpitude," so that the "moral turpitude" would be modifying the word "felony" as well as "any offense". [6] In the case of a lawyer they did not put that comma in there.

And it is significant, if the court please, in the portion of the section where they put in about a plea of nolo may be considered as a conviction, a comma was not placed after the word "felony".

Now, it means one of two things has happened. Either inadvertently a comma was put after the word "felony" in the first portion of the section so that mere conviction of a felony standing by itself alone, in the case of a doctor, would be grounds for disciplinary action. Either that was done inadvertently, or if it was done intentionally we can't blow hot in one breath and cold in the other, because then it would mean that the Legislature apparently had in mind, where the state was going to rely on a plea of nolo, for the purpose of sustaining the conviction, that then it would have to be a case that involves moral turpitude.

Nowhere in this case is there any contention that there is any moral turpitude. As a matter of fact,

at the hearing before the administrative hearing officer it was conceded by the State of California that on the basis of the record that they had not sustained their burden of showing that there was any moral turpitude.

Now we come to the situation, taking the points and authorities cited by the Attorney General's Office, for example, on page 30, at line 18, they talk about legislation [7] being permitted for the purpose of determining the qualifications of a doctor to practice within this state. And from the very case that they cite we find this language:

> "The only limitation on the above doctrine is the principle that the regulations must be reasonable and must bear some relation to the service to be rendered by the licensee."

And in this case there is absolutely nothing to indicate that this is done for the purpose of protecting the public health. It is strictly on an income tax matter without any showing whatsoever that the things that got the doctor involved in his income tax troubles resulted from improper practice as a doctor, for example, whether it had been abortions or narcotic traffic, or anything at all that might possibly reflect on him as a doctor. So the question of public health, if the court please, is not involved obviously in this case here.

Now, it is our contention that this court does have the power to act, if it believes under the facts this is a proper case on which to act. We have cited in our points and authorities here, beginning at page 2, line 28, and extending to page 3, line 24,

that every court has the inherent power to enforce its judgments and decrees.

Now, I will be frank to state to your Honor, as Mr. Mamakos stated, I have not found a case that would be specifically [8] right on all fours, and I wish we had been able to find something like it that would help us in the thing. All we can do is take cases by analogy on that situation, and that the court has the power to issue such process as may be necessary to render its judgments and decrees effective. And that the power to enforce the decrees is necessarily incident to the jurisdiction of courts.

And what is particularly important here is that the federal court may stay proceedings in a state tribunal, where it is necessary to protect or effectuate its judgment. That is contained in Section 2283 of Title 28 of the United States Code.

Now, since it is well-settled law, as set forth in our supplemental points and authorities, which were filed this morning—and, frankly, the reason they were not filed sooner, I was proceeding on that undoubtedly the court is familiar with them, but I thought, just to make sure of our record, I would file the points and authorities—and that is that a plea of nolo cannot be used in any other action for the purpose of being used against a defendant.

The Court: Of course, the great problem you have there is what was used is not the plea of nolo, but the judgment of conviction. The plea of nolo is something that you can't go and introduce in

another court as an admission, but the fact of conviction, the fact there is a judgment of conviction [9] is a different thing. Those judgments of conviction often follow from such things as a plea of not guilty and a verdict of guilty. The defendant still insisting he is not guilty, but the jury having said he is, the judge denying a motion for judgment of acquittal, the various other courts in other matters or administrative agencies, such as you have here, might consider the judgment. And I gather from your complaint what happened here was the fact that he had been convicted, the judgment was the conviction, is what is held against him, rather than the way in which the conviction came about, which was by reason of a nolo contendere plea, in which he presented the accumulation of a record, in which he said, "Yes, I did it," or a plea of guilty, something to that effect.

Now, there are times when, as you know, the traffic court, when someone has been given a traffic citation in a situation where a personal tort liability is claimed also to exist. The person who is given that citation will sometimes not be willing to go in and plead guilty in the traffic court simply because his announcement that he is guilty would be used in evidence against him, but he will go in and sit through a trial, offer no defense, and the judge finds him guilty, and the judgment is not admissible against him, where the plea of guilty would have been admissible against him as an admission.

Now, in our courts, with the use of nolo contendere here, we prevent the situation arising where

such a plea is allowed, of a defendant making evidence against himself by saying, "I am guilty." He simply says, "I do not contend with you." Nolo contendere. Hence, it is the admission for the purpose of the case only, that is, it is such a declaration, that removing the allegation of the indictment from controversy it follows there is kind of a judgment by default.

From your complaint here I gather that the doctor is suffering disciplinary action from the administrative agency, not because of what he said when he was asked, "How do you plead," but from what the court did when the court entered a judgment of guilty upon that plea.

Mr. Chotiner: Except, though, if I may point out the situation, it is true that the state is proceeding based on a conviction, but it is a conviction based on a nolo plea under the statute. For example, before the 1951 amendment was passed to the Business and Professions Code, apparently, a conviction based on a plea of nolo—at least, the Legislature must have thought so—would not have been sufficient to sustain disciplinary action. That is the reason they put into the statute that particular provision.

So while it is true that it is the conviction on which they are proceeding, still under the California statute, it is a conviction based on a nolo plea, which forms the foundation [11] for the disciplinary action.

Now, this isn't a case where you might say an individual was just simply hiding behind a plea

of nolo. Here we have in the record the statements made by the judge who sentenced him. And without going to the length of reading all the judge said——

The Court: I have read it twice.

Mr. Chotiner: Your Honor is familiar with it. It is a clear indication that the evidence before the judge is such that it is not a case that involves moral turpitude. Now, if we are going to hold that they cannot take disciplinary action against a lawyer, unless there is moral turpitude, but they can against a doctor, it would appear that that on the face of it would show that it is discriminatory legislation.

We feel, under those circumstances, that the Act itself would be unconstitutional, and if the Act is unconstitutional—of course, we have no objection, your Honor,—you feel there are sufficient grounds to go on the question of unconstitutionality and convene a three-member court. That isn't our point.

Our situation is this: That we feel this court can act individually because of the application and what was done to the doctor, without even finding that the act was unconstitutional. [12]

If the court feels it must proceed through a three-member court, of course, we have no objection to that procedure being followed.

The Court: We do that when the constitutionality of a federal statute is in question. There is no federal statute in question here. In fact, I have not found anywhere in your authorities any citation to a law which gives this court jurisdiction.

Now, I have sympathy for your position, that your client was treated a bit roughly, roughly to the extent of having been suspended for a year, under circumstances which had I been the administrative body I would not have felt justified upon the record as you have pleaded it, if that is the whole record. But I have to look to the jurisdiction of this court. This court is not a court of general jurisdiction. It has such jurisdiction as has been conferred upon it by Acts of Congress.

And looking at various jurisdictional statutes, I cannot find that we have jurisdiction to review or set aside findings of an administrative agency of a sovereign state, or to collaterally adjudicate upon the same controversy, nor are we a Court of Appeals from the court of last resort of California. The Supreme Court of the United States might be, but that depends on whether they granted certiorari. We do not have a power to grant certiorari to this court. [13]

So I can't see that it is a matter within our collar to hear you.

Mr. Chotiner: There is an additional factor, though, that I think does give this court the power to act, and that is, first of all, whether or not we have a situation of an ex post facto law involved here, because that would then definitely, I feel, give us a federal question here.

Now, the state is claiming that what they proceeded on was a conviction that occurred after 1951. And we contend that it is based upon facts that

occurred in 1947 and 1948, which is before the adoption of the 1951 amendment.

We find, even taking the authorities cited by the Attorney General, on page 31, at line 20, where the whole question is whether or not it is the conviction that counts, the court states that the authorities cited, that the vital matter is not the conviction but the violation of the law. And that the former, meaning the conviction, is merely prescribed evidence of the latter, to wit, violation of the law.

Now, before 1951 was concerned—and these years involved are 1947 and 1948—there could not have been any disciplinary action against the doctor, because the comma was not inserted until 1951. It would, therefore, have been necessary for the state to have shown moral turpitude against the doctor.

So what happened was that after 1951, after the plea of [14] nolo contendere plea was entered and the conviction was entered on the basis of the nolo plea, then they say, "We will now rely on the conviction for the purpose of disciplining Dr. Furnish here, and without the necessity of showing that there was any moral turpitude involved."

Under those circumstances, we feel that this court would have the power to act.

The Court: Yes, but you brought that controversy to a federal court, and your problem is a California problem. I think the California courts, having adjudicated it, even if they adjudicated it differently than I would, they were the ones who had power to do it and I am a bystander. I do not

acquire power just because I might disagree with their decision.

It is just a question of jurisdiction, to come in here and present your case to this court. And I think on the cases you have pleaded we do not have a federal question.

I am sorry to decide it against you, and unless you convince me there is a federal question I am going to do it on the narrow ground that I do not have jurisdiction. You can take an appeal from that and maybe you can get a stay from the Circuit Court while you argue it, and the Circuit Court might reverse me. I think if they were to do that in this case, it might result in substantial justice as a general policy of the architecture of the law and tend toward reducing [15] the confusion and lack of finality in judgments.

Mr. Chotiner: Well, it would appear to me, your Honor,—and I respect your Honor's feeling in the matter—that in the interest of justice it would be far better in this case if a preliminary injunction were granted, allow the state to take the appeal, because what I have in mind is, frankly, the question of the doctor being permitted to practice with 12 patients in a hospital and the doctor associated with him is now ill and not able to take care of them. Frankly, we have a serious problem facing us; not facing us, but facing the patients Dr. Furnish has been treating and taking care of.

The Court: But that kind of a situation cannot vest jurisdiction in a court. The law doesn't say we have the power.

Mr. Chotiner: The only thing I can say in answer to that is simply this: That I think the court has jurisdiction for the reason the federal questions are involved. One is whether or not the state is depriving Dr. Furnish of the privilege of practicing medicine in the State of California by adopting an ex post facto application of the law as to him.

Secondly, that the Act is discriminatory as against him, in view of the fact that in the case of another profession, to wit, that of lawyers, that it is necessary to show moral turpitude by the decision of the California Supreme Court in the case of In Re Hallinan. [16]

The Court: I don't know what kind of extraordinary writ would lie to—the appellate court of our Circuit is in session now. They will be until the middle of next week; the three judges here.

If I go ahead with my present intention, declare you out of court for want of jurisdiction to hear you, it might be that a writ of prohibition or something of that kind could be obtained from our Circuit Court to restrain me from signing the judgment, because the judgment will not be signed until five days after it has been submitted. And it is the duty of the prevailing party to submit it.

So you could go there and find out quickly by application for such a writ, find out authoritatively whether I have jurisdiction. I think I do not have.

It has been my judicial training that I should decide cases as the law indicates, rather than as I

would write the law if I were in the Congressional function.

So, although sympathetic to the plaintiff's position, in this particular case as it has been pleaded, I don't think I have the power.

If they are open upstairs they will at least see you and they might entertain your writ.

Mr. Chotiner: Of course, I appreciate your Honor's thought in the matter advising us of the situation, and actually that is the only alternative, you might say, at the [17] moment, that is available to us.

The Court: Well, it is an alternative by which you would determine this question of jurisdiction. You can appeal. Of course, to get a regular appeal heard would mean it would come up sometime after the order of the administrative agency would have been in force for some time, and the 12 patients would either have gotten well or died.

Mr. Chotiner: Unless the stay were granted in the meantime, which of course is another matter.

May I inquire of the court, so we may properly prepare our application for a writ of prohibition, that apparently it is the court's intention to sign such an order dismissing the matter,——

The Court: It is.

Mr. Chotiner: ——and also may I inquire, however, if the court under the present circumstances will allow the temporary restraining order, of course, to remain in effect until your Honor does sign the order?

The Court: Yes, the temporary restraining order

will remain in effect until the judgment is signed in this case. The judgment which the court intends to sign is a judgment of dismissal for want of jurisdiction of the subject matter of the action.

The court doesn't know whether prohibition is a proper remedy, but if it isn't—that is the only remedy that comes [18] to mind, and I know it has been used in some very similar circumstances. I think you could test jurisdiction in that way. And I make an emphatic declaration of my intention to sign that judgment, so that you will have a record to take up to the Court of Appeals. All you will need to show my intention, I think, is a transcript of this afternoon's proceedings, and the usual papers you file on applying for a writ of prohibition.

Mr. Chotiner: Well, in the interest of my client —I don't know whether Mr. Parsons has anything to add to convince your Honor of a different course of action, but I will ask the court's indulgence in the event there is, that he be heard also in this matter.

The Court: Certainly.

Mr. Parsons: I might say this, that I can say nothing more than Mr. Chotiner has urged. I don't want to belabor it. Of course, we have lived with this for some time. Of course, there are many lawyers and judges, differences of opinion, but we thought there was a substantial federal question here, because the state is attempting to trespass upon this court's authority. They are using something that occurred here, not over there (indicat-

ing). They are intruding something into your judgments in this court.

A nolo contendere plea has never been used, and I sat here and I thought the best illustration—I wondered why I hadn't [19] thought about it—the best illustration I have ever heard of is just what you said a moment ago about the man in the traffic court. He is confronted with a serious lawsuit for damages. When he is arrested and tried in traffic court he just sits there, even if he doesn't offer a defense, because the judgment can't be used against him. But his plea could be, because that is an admission.

Now, it is our contention that the state is attempting to read into this something that is not there. And our only hope is to come here to this court. This court has a duty to protect its judgments.

The Court: Of course, the judgment of the federal court has not been pleaded in verbatim, that is, we do not have a copy of the judgment here. We have Judge Yankwich's oral remarks from which the clerk did prepare the judgments, and it appears from the record that you have pleaded in your complaint that what the administrative agency has done has been to not look to the nolo contendere but they have looked to the judgment.

Now, it seems to me that if a sovereign body, such as the State of California, wants to look to a judgment as a form of evidence, they may do so. They do it in res judicata, and I think in other instances they sue upon the judgment in order to

get a new one, not having collected the first one before the statute of limitations is about to run. The judgment is [20] brought in as evidence.

I think what this Board of Medical Examiners has been doing is to look to the judgment—at least, that is the inference we draw from what is set forth in the pleadings—rather than to look to the plea which resulted in the judgment. If Dr. Furnish had been convicted by evidence, after a plea of not guilty, they could have done that.

So the idea that I had for a time after you filed this Complaint that this court might have jurisdiction, because we have power to protect our judgments, doesn't have validity as you examine it because we can take judicial notice that the judgment has been satisfied. The judgment hasn't been attacked in any way. There isn't any attempt to reek anything more from the judgment than it provides.

If the State of California wants to say that a conviction of income tax evasion shall be evidence of moral turpitude, they can do that, just as in the federal system we say that evidence of a transfer of property under certain conditions shall, in the event of bankruptcy, be evidence of fraud, although there is an inability to prove any actual fraud. It just becomes something that exists in contemplation of law.

In your state law you have the bulk sales law and so on, where a fraud is presumed from certain transactions. I think those kind of presumptions might be drawn from just the fact of a judgment, regardless of how the judgment was arrived at. [21]

So we have no duty here or power to act to protect our judgment in this court, because no one is attacking the judgment of this court. They are simply using it as evidence. Under the separation of powers, the state having theirs and the national government having its powers, if they want to establish a system by which they consider a judgment evidence, they have power to do so. And if they have that power, if their courts make a mistake it is their courts that do it, and their courts that have the power, and the power to decide includes the power to occasionally make a mistake and decide incorrectly.

But there is nothing in the statutes, insofar as they have been pointed out to me, which gives this court a power to step in and revise the state court's action.

Now, I perhaps have talked more than I should, because it has been rather wordy. But I think if you go up to get your writ of prohibition you will need this transcript. My only request in that connection is that in order to preserve the context, if you take any you take all.

Mr. Parsons: Well, we will take all. Let me say, from the beginning, whatever you have said I will say has been helpful to me in properly appraising the case and attempting to determine what to do. And I hope you forgive me for disagreeing with you, as I am but a humble lawyer, but I think it is the duty of this court to protect its judgments, and [22] this whole thing flows from the nolo contendere plea.

The Court: That wasn't a judgment, though. The nolo contendere plea was not a judgment. It is no act of the court, it is an act of the defendant.

Mr. Parsons: Yes, but the judgment is based on that, and the Supreme Court of California itself recognized that in construing the effect and breadth and width of a nolo contendere plea they had to look to the federal courts as to what they had said about it. And they adopted that, and properly so.

We earnestly contend that this court does have the right to protect its judgments and does have the jurisdiction. Otherwise, they can do what they please with a man, and they do not have that power. They are brought to task continually in the state courts under due process, for denying people rights along the way that have been carved out.

The Court: Well, if they prohibit me from signing the judgment, which I take it the Attorney General will present here within five days, I will be glad to hear your case.

Mr. Parsons: Very well.

The Court: But unless they prohibit me from signing such a judgment, if the Attorney General is reasonably prompt in getting it in, one will be signed dismissing the case solely for want of jurisdiction.

Mr. Parsons: Very well. Thank you for [23] courteously hearing this at this point.

The Court: Thank you. It is always interesting to have you here and helpful. It is stimulating to have good lawyers come into one's court.

Court is adjourned.

(Whereupon, at 2:45 o'clock p.m., Friday, December 6, 1957, an adjournment was taken.)

[Endorsed]: Filed December 10, 1957.

[Endorsed]: No. 15835. United States Court of Appeals for the Ninth Circuit. Richard Douglas Furnish, Appellant, vs. The Board of Medical Examiners of the State of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 26, 1957.

Docketed: December 30, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15835

RICHARD DOUGLAS FURNISH, M.D.,
Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA, et al.,
Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

On November 10, 1955, the Board of Medical Examiners of the State of California made an order suspending appellant for one year from the practice of medicine and surgery in the State of California, after a hearing before the Board's Hearing Officer, who proposed that appellant be suspended for one year, and that execution be stayed and appellant be placed upon probation for three years; the Hearing Officer's proposal was rejected by the Board.

The Order of suspension was based on the appellant's plea of nolo contendere to two counts of violating Title 26, United States Code, Section 145(b) (income tax) for the years 1947 and 1948.

Counsel for the Board of Medical Examiners, at the hearing before the Hearing Officer, stipulated that the Board of Medical Examiners, in its action

against the appellant, did not seek to discipline him for the conviction of an offense involving moral turpitude; and that the record did not establish that the convictions relied on did in fact involve moral turpitude; and that the Board did not sustain the burden of proof on the issue of moral turpitude.

Appellant intends to rely on the following points:

1. The stigma which follows and attaches to conviction of a felony is not considered to attach and follow a conviction under a nolo contendere plea.

2. A plea of nolo contendere does not carry with it any of the civil penalties, nor does it carry a suspension of civil rights.

3. At the time the offenses were alleged to have been committed, namely, income tax evasion for the years 1947 and 1948, Section 2383 of the California Business and Professions Code provided "the conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of conviction is conclusive evidence of such unprofessional conduct."

The Section was amended in 1951 by inserting a comma after the words "the conviction of a felony" and there was added "a plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this Section. * * *"

It is therefore urged that the Board of Medical Examiners, in applying the law as enacted in 1951

rather than the law as it was in 1947 and 1948, has invoked an "ex post facto law" and thus the law itself and its application is unconstitutional and in violation of Article I, Section 10 of the United States Constitution. That the application of such an ex post facto law amounts to a denial of due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

4. A nolo contendere plea is insufficient to warrant the suspension of the appellant where there is no affirmative proof of moral turpitude, and in this case Judge Leon Yankwich, the trial Judge, in effect held that there was no moral turpitude by his remarks at the time of the imposition of sentence.

5. A conviction based on a plea of nolo contendere cannot be used in any other case.

6. The Medical Board is guilty of an intrusion into the processes of the Federal Court and has attached a penalty to the appellant which is not prescribed by law.

7. Every court has inherent power to enforce its judgments and decrees, and may issue such process as may be necessary to render the court's judgments and decrees effective.

8. The Federal Court may stay proceedings in a State tribunal where necessary to protect or effectuate its judgment.

9. At the time the Legislature adopted the 1951 amendment to Section 2383 of the California Business and Professions Code it either inserted a comma after the word "felony" inadvertently or

intended to do so. In the event it intended to do so for the purpose of making a conviction of a felony without involving moral turpitude a ground for disciplinary action, it is clear the Legislature did not have in mind that a plea of nolo contendere to a felony not involving moral turpitude would come within the class of cases subjecting a physician and surgeon to disciplinary action, since it did not insert a comma after the word "felony" in the portion of the Section dealing with a plea of nolo contendere.

10. In the case of an attorney it is necessary to show moral turpitude in order that a conviction be cause for disciplinary action under Section 6101 of the California Business and Professions Code. In the case of an attorney the State Legislature did not insert a comma after the word "felony", as it did in the case of a doctor.

Respectfully submitted,

MURRAY M. CHOTINER and
RUSSELL E. PARSONS,
/s/ By MURRAY M. CHOTINER,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 31, 1957. Paul P. O'Brien, Clerk.